STATE OF MICHIGAN
IN THE SUPREME COURT

JEFF TRECHA , Next Friend of
BRADLEY TRECHA, a minor, and
JEFF TRECHA,

Plaintiffs-Appellants,

v

BRENDEN REMILLARD,

Defendant-Appellee.

Supreme Court No. 161232

Court of Appeals No. 347695

Genesee County Circuit Court
No. 17-109425-NI

_____/

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DEFENDANT-APPELLEE'S ANSWER TO PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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COUNTER-STATEMENT OF JURISDICTIONAL BASIS

Defendant-Appellee, BRENDEN REMILLARD, agrees that this Court has jurisdiction to decide this appeal by leave pursuant to MCR 7.303(B)(1) and 7.305(C)(2)(a) for the reasons stated by Plaintiff-Appellants, JEFF TRECHA, as Next Friend of BRADLEY TRECHA, and JEFF TRECHA.

COUNTER-STATMENT OF QUESTION PRESENTED

I. AS A MATTER OF LAW, IS DEFENDANT ENTITLED TO SUMMARY DISPOSITION ON PLAINTIFF'S "SPORTS INJURY" CLAIM UNDER THE "RECKLESS MISCONDUCT" STANDARD BECAUSE (1) PLAINTIFF AND DEFENDANT WERE CO-PARTICIPANTS IN THE TENNIS PRACTICE, (2) THE RISK OF BEING HIT BY A TENNIS BALL WAS INHERENT IN THAT RECREATIONAL ACTIVITY AND REASONABLY FORESEEABLE UNDER THE FACTS OF THIS CASE, AND (3) DEFENDANT'S CONDUCT WAS NOT RECKLESS?

The trial court answered "Yes".

The Court of Appeals answered "Yes".

Plaintiffs-Appellants contend the answer is "No".

Defendant-Appellee contends the answer is "Yes".

COUNTER-STATEMENT OF FACTS

The sparse Statement of Facts presented by Plaintiffs-Appellants does not contain many relevant facts, including where BRADLEY TRECHA (hereinafter Plaintiff) and Defendant-Appellee, BRENDEN REMILLARD, were positioned on the tennis courts when the accident occurred. In addition, Plaintiff has not included a complete recitation of the trial court's reasons for granting summary disposition to Defendant, and the Court of Appeals' reasons for affirming that ruling. Accordingly, Defendant offers the following recitation of facts.[1]

A. Pre-Accident Facts.

Plaintiff and Defendant were members of Fenton High School's varsity tennis team. (Ex 7, 16-17; Ex 8, 4). Plaintiff was a 14-year-old freshman; Defendant was a 17-year-old senior. (Ex 7, 5, 16; Ex 8, 3, 6). Their tennis coach was Gary Ballard. (Ex 7, 47; Ex 8, 14; Ex 9, 15).

Fenton High School had two banks of four tennis courts. (Ex 7, 12, 49; Ex 9, 6). The two banks of courts were separated by a fence. (Ex 7, 12; Ex 8, 9; App A [photo]). The fence was fifteen feet behind the baselines of the courts. (Ex 7, 15; App A).

Tennis practices were held after school between 2:30 and 4:00 p.m. (Ex 7, 15-16). After matches were finished, Coach Ballard required the players to pick up all tennis balls from the courts and place them in large carts. (Ex 7, 11; Ex 8, 7; Ex 9, 10, 17-18; App A). Coach Ballard would not dismiss the players from practice until all balls were picked up because he did not want to leave a "mess" on the courts. (Ex 7, 11, 21-22; Ex 9, 16-18). Occasionally, Coach Ballard had the players run "sprints" during practices, which consisted of players running back and forth in a straight line. (Ex 8, 15-16; Ex 9, 8, 10, 16-17).

Coach Ballard discussed proper safety on and off the courts with his team. (Ex 9, 6). He

[1]References to "Ex [number]" are to the exhibits attached to Plaintiff's application. References to "App [letter]" are to the appendices filed with this answer.

told them not to hit balls in the direction of another person, or to hit balls after players had finished their matches, because someone could get hurt with a ball. (Ex 8, 20; Ex 9, 12-13). In addition, balls should not be hit towards the fences. (Ex 9, 13). Coach Ballard did not allow horseplay or "bedlam". (Ex 9, 18). Plaintiff understood that people could be severely injured if they were hit by balls, and Coach Ballard did not consider such situations a "joke". (Ex 7, 20).

B. <u>The Accident.</u>

The accident occurred about 4:00 p.m. on September 9, 2016, during tennis practice. (Ex 7, 10-11, 15, 21; Ex 8, 7). Plaintiff had finished his match, and was picking up balls and placing them in a cart near the first court. (Ex 7, 11, 14). Defendant was finishing his doubles match on the same court. (Ex 7, 14; Ex 8, 8). Coach Ballard was coaching players on the other bank of courts. (Ex 8, 15; Ex 9, 6-7).

According to Plaintiff, he was bending down to pick up balls about ten feet away from Defendant just before the accident. (Ex 7, 11-13, 15). Defendant did not notice Plaintiff because Plaintiff was standing behind him between the baseline of the court and the fence. (Ex 8, 8-9, 20). Defendant did not notice any other team members picking up balls in the area while he was playing his match. (Ex 8, 10).

Defendant lost the last point of his match. (Ex 8, 8, 10, 21). Immediately thereafter, Defendant pulled out the last remaining ball in his pocket and hit it underhand back towards the fence. (Ex 8, 8, 10-12, 14, 21). He struck the ball with force, but not "super hard". (Ex 8, 14). Defendant admitted that he hit the ball out of frustration for losing the match. (Ex 8, 11, 21).

Just as Defendant hit the ball, Plaintiff stood up and turned to place balls into the cart next to him. (Ex 7, 11-13, 18). The ball hit Plaintiff's left eye. (Ex 7, 12). Plaintiff felt extreme pain and fell to the ground. (Ex 7, 12).

After hitting the ball, Defendant turned around toward the fence. (Ex 8, 11-12). He noticed for the first time that Plaintiff was standing behind him by the fence. (Ex 8, 9, 12-13). Defendant saw the ball hit Plaintiff in the face. (Ex 8, 10, 12). If he had known that Plaintiff was behind him, Defendant would not have hit the ball in that direction. (Ex 8, 21).

Defendant immediately went over to Plaintiff to see if he was okay. (Ex 8, 9, 13). Defendant apologized and told Plaintiff that he did not mean to hit him. (Ex 7, 17-18; Ex 8, 13). He took Plaintiff to the athletic trainer, and told the trainer what had happened. (Ex 8, 9, 13-15).

Coach Ballard did not see the accident. (Ex 9, 6, 11). After he finished with players on the other bank of courts, Coach Ballard noticed Plaintiff with ice on his eye. (Ex 9, 7). He also saw several students running around, "goofing off", and not picking up balls. (Ex 9, 7, 10). Coach Ballard "got mad" because Plaintiff had been hit in the eye, and other students were "messing around". (Ex 9, 7-8, 11). He made the students (including Defendant) run sprints as punishment before dismissing them from practice. (Ex 7, 17, 20-21; Ex 8, 14-15; Ex 9, 7, 11).

Coach Ballard talked with Plaintiff and Defendant after the accident. (Ex 7, 17; Ex 8, 14, 17; Ex 9, 7-9). Defendant admitted that he should not have hit the ball behind him, and explained that he did not mean to hurt Plaintiff. (Ex 8, 14). Coach Ballard understood, but was upset by the incident. (Ex 8, 14-15).

Plaintiff was examined at Genesys Hospital, where fibers from the tennis ball were removed from his eye. (Ex 7, 22-24). The resulting diagnosis was blunt eye trauma, traumatic mydriasis, and vireous synersis. (Complaint, ¶10).

Plaintiff returned to the varsity tennis team the following year. (Ex 7, 20, 29; Ex 9, 17). He also completed driver training and received a driving permit. (Ex 7, 34).

Plaintiff continues to experience headaches, pain and blurred vision in his left eye, and

sees flashes of light and floaters in that eye. (Ex 7, 21, 33-34, 42). He wears prescription glasses, sunglasses, and protective glasses when he plays sports. (Ex 7, 26, 30-31, 38).

Plaintiff knew that Defendant did not intend to hurt him, and that the incident was an accident. (Ex 7, 43). Nevertheless, Plaintiff believed that Defendant had acted unreasonably by not following the rules. (Ex 7, 43). Defendant admitted that Plaintiff did not do anything to cause his injury, except for standing behind the area of play. (Ex 8, 16)

C. Litigation Facts.

On July 11, 2017, Plaintiff's father – JEFF TRECHA – filed this suit in Genesee County Circuit Court on behalf of Plaintiff and himself. (App C, 7/11/17 entry). In his complaint, Plaintiff acknowledged that Defendant had not expected or intended to injure him. (Complaint, ¶7). Plaintiff only alleged that Defendant had been negligent or grossly negligent in hitting a tennis ball towards him. (Id., ¶¶4-6, 9). Plaintiff further alleged that he and Defendant "were not participating in the game of tennis at the time of the injury." (Id., ¶8).

In his answer, Defendant denied liability, and asserted several affirmative defenses, including that the parties were co-participants in a recreational activity, to which Plaintiff subjected himself to risks inherent in the activity. (Answer & Affirmative Defenses).

In December 2017, Defendant filed a motion for summary disposition pursuant to MCR 2.118(C)(8) & (10). (12/18/17 Motion, 1; Brief, 2-3). Relying on *Ritchie-Gamester v City of Berkley*, 461 Mich 73 (1999), *Bertin v Mann*, 502 Mich 603 (2018), and cases involving sports injuries, Defendant argued that the "reckless misconduct" standard of liability applied because he and Plaintiff were co-participants in a recreational activity (i.e., a tennis practice), and the risk of being hit by a ball was inherent in that activity and reasonably foreseeable. (Id., Motion, ¶¶6-7; Brief, 3-11). In addition, Plaintiff had not alleged, and there was no evidence to establish, that

Defendant had acted reckless. (Id., Motion, ¶¶3, 8; Brief, 10-12).

Plaintiff responded that *Ritchie-Gamester* was inapplicable, and Defendant could be held liable for negligence or gross negligence, because the parties were not "co-participants". (1/10/19 Answer, ¶¶1, 5-7; Brief, 4-7, 9). Plaintiff explained that he was not participating in the match Defendant was playing, and was not playing tennis at all, when he was hit by the ball. (Id., Brief, 2, 4-7, 9). Plaintiff further argued that it was not reasonably foreseeable that another player would hit a ball without looking at someone not participating in a game. (Id., Brief, 6-7, 10-11). Since Defendant's conduct in hitting a ball out of frustration without looking was negligent as a matter of law, Plaintiff requested summary disposition pursuant to MCR 2.116(I)(2). (Id., Brief, 1, 7-8). Alternatively, if the "reckless misconduct" standard did apply, Plaintiff argued that Defendant's conduct could be deemed reckless. (Id., Answer, ¶6; Brief, 10).

On February 4, 2019, Judge Celeste D. Bell heard oral arguments. (App B). At the beginning of her ruling, Judge Bell commented that she had spent time on this issue because she was a "former tennis player in my youth", and "was able to visualize what was going on here." (App B, 9). Thereafter, she recounted the standards for granting summary disposition under MCR 2.116(C)(8) & (10) (id., 9-10), and summarized the undisputed facts as follows:

> "The significant undisputed underlying facts are the defendant upon losing a high school – and this would be the time that if you disagree with my undisputed facts tell me now because I can – I'll correct these, but this is what I understand. The defendant upon losing a practice high school tennis match retrieved a ball from his pocket and he hit it behind him. The plaintiff was collecting balls from the court behind the defendant and the ball hit the plaintiff in the eye. It's not alleged, nor is it supported by the record, that the defendant intentionally directed the ball to the plaintiff. And in fact, Mr. Jakeway [i.e., Plaintiff's attorney], you did make that statement in your argument." (App B, 10).

The parties' attorneys did not correct that recitation of facts.

Thereafter, Judge Bell summarized the parties' positions as to which duty and standard of

care applied. (App B, 10-11). She concluded that the "reckless misconduct" standard applied because Plaintiff and Defendant were co-participants in the tennis practice:

> "Despite the plaintiff's assertions to the contrary, based on the *Ritchie-Gamester versus the City of Berkley* case, as well as the several other sports related cases that were cited by the parties and reviewed by this Court, this Court finds that the plaintiff and the defendants were co-participants. At the time of the incident, each was a member of the Fenton High School tennis team, each was present at a tennis practice. At the time of the incident, each was participating in an activity common and foreseeable for tennis practice. Because the plaintiff and the defendant were co-participants, the proper standard that this Court must then apply in terms of evaluating the defendant's conduct is whether it was reckless misconduct." (App B, 11).

Next, Judge Bell summarized *Bertin*'s factors for determining whether the risk of injury was reasonably foreseeable and inherent in the recreational activity. (App B, 11-12). She concluded that being hit by an errant ball is a risk inherent in tennis practice, and was reasonably foreseeable in this case:

> "Here the court must first note that as quoted by Ms. Christensen [i.e., Defendant's attorney]:
>
> "'Getting hit by an errant ball is a risk inherent to tennis practice.'
>
> "That was acknowledged in the unpublished case that was cited, and I think it's *Chryczyk*.[2] But even then, it appeared earlier – that was a quote from another case.
>
> "The Court must look to considerations like regular departures from the rules or other practices, the testimony of Coach Ballard, as well as statements from both the plaintiff and the defendant help to establish, in the Court's opinion, that the defendant's conduct was not an irregular departure. The parties and the coach consistently testify that picking up tennis balls was a routine part of tennis practice. Because the courts are in an enclosed space it stands to reason that an errant ball poses a reasonably foreseeable risk of injury.
>
> "The plaintiff would have the Court focus on the defendant's having hit the ball out of frustration. Coach Ballard testified that he regularly reminded the team members not to hit balls into the fence. The Court has to question if team

[2] *Chryczyk v Juhas*, unpublished per curiam opinion of the Court of Appeals, issued January 27, 2011 (Docket No. 294348) (attached in Exhibit 6).

members didn't routinely hit balls, striking balls into the fence without being closely monitored, why would there be a need for the coach to be regularly reminding them to refrain from doing that? This all going to the foreseeability of this occurring." (App B, 12-13).

Finally, Judge Bell analyzed whether Defendant's conduct could be deemed reckless. She concluded that at most, Defendant was careless:

> "*Behar* [*v Fox*, 249 Mich App 314, 319 (2001)], which has also been cited in both briefs, defined reckless misconduct as one who is properly charged with recklessness or I'm just gonna quote this:
>
> > "'One who is properly charged with recklessness or wantonness is not simply more careless then one who is only guilty of negligence. His conduct must be such as to put him in the class with the willful doer of wrong. The difference is that between him who casts a missile intending that it shall strike another and him who casts it where he has reason to believe it will strike another being indifferent whether it does so or not.'
>
> "In this case, I don't think that Mr. Remillard falls into that latter category. He did not know. He didn't look, he may have been being careless, but the Court does not believe that his conduct rises to the level of being reckless as has been established in the line of precedent that we're all looking at.
>
> "So, for those reasons, the Court is granting the defendant's motion." (App B, 13).

Identical orders granting Defendant's motion for summary disposition were filed on February 5 and 8, 2019. (Ex 1). On February 15, 2019, Plaintiff timely filed a Claim of Appeal.

D. <u>Court of Appeals' Opinion.</u>

On April 23, 2020, Court of Appeals Judges Stephen L. Borello, Patrick M. Meter, and Michael J. Riordan issued a four-page unpublished per curiam opinion affirming summary disposition for Defendant. (Ex 1). After summarizing the facts and holdings of *Ritchie-Gamester* and *Bertin* (Ex 1, 1-2), the panel held that the "reckless misconduct" standard applied because Plaintiff and Defendant were co-participants in a recreational activity:

> "We agree with the trial court that reckless-misconduct is the appropriate

> standard to judge plaintiff's claim. Plaintiff argues that defendant and Bradley were not coparticipants in a recreational activity – and therefore that the standard could not be recklessness – because practice was over at the time of the injury. As we must when reviewing the trial court's grant of summary disposition, we credit plaintiff's assertion that practice had ended by the time of the injury. Nevertheless, we cannot conclude that a coach's conclusion of 'practice' defines the scope of the recreational activity. This jurisdiction has consistently rejected attempts to judicially police the boundaries of recreational activities. See [*Bertin*, 502 Mich at 619]. Rather, this jurisdiction defines the recreational activity by the risks that are reasonably foreseeable in undertaking it. *Id.* In this context, the 'risk must be defined by the factual circumstances of the case – it is not enough that the participa[nt] could foresee being injured in general; the participant must have been able to foresee that the injury could arise through the "mechanism" it resulted from.' *Id.* at 620." (Ex 1, 2-3).

Thereafter, the panel rejected Plaintiff's argument that being hit by a tennis ball was not foreseeable because practice had ended when Defendant hit the ball toward the fence. Based on multiple facts, the panel concluded that Plaintiff's injury was reasonably foreseeable:

> "Plaintiff does not argue that being hit with a tennis ball is not a reasonably foreseeable risk of playing tennis. Plaintiff argues, rather, that this risk was not foreseeable at the time Bradley was injured, i.e., after practice. We disagree. First, we note, as the trial court did, that Bradley was injured in the fenced tennis court area. The very nature of tennis is that tennis balls, for better or worse, will leave the actual bounds of the court, such that a person standing near, but not on, the court risks being hit from a ball. The risk comes not only from tennis balls being hit to score points, but also tennis balls hit as practice or, in this case, out of frustration – especially when the sport is being undertaken competitively by high-schools students. See [*Bertin*] at 621 (noting that the factual circumstances that define the risk 'include the general characteristics of the participants, such as their relationship to each other and to the activity'). Moreover, in a team practice with multiple participants playing in close proximity, it is reasonable to foresee that participants will cease hitting tennis balls at different times, even when the coach says that practice is over. Indeed, the record in this case shows that defendant hit the ball in question immediately after his match ended. The team's coach testified that he had to repeatedly remind players not to hit balls into the fence, indicating, as the trial court found, that the practice was fairly common. Under these circumstances, we must conclude that a reasonable participant could have foreseen being hit with a tennis ball while in the bounded tennis area near the fence, about the time that other participants were concluding matches, despite the fact that practice may have ended. Accordingly, we agree with the trial court that the reckless-misconduct standard applied to plaintiff's claim." (Ex 1, 3).

Finally, the panel addressed whether Defendant had acted recklessly. Applying the definition of "recklessness" in *Behar*, 249 Mich App at 319 (Ex 1, 3), the panel held that Defendant's conduct was no more than careless:

> "We also agree with the trial court that no question of fact exists whether defendant acted recklessly in hitting the tennis ball.
>
> * * * *
>
> "The record evidence in this case shows that defendant, out of frustration for losing the match, hit a ball underhand at the fence without looking to see who was there. Although defendant's actions were certainly ill-advised, we cannot conclude that this conduct amounts to a willful indifference to harm. The action happened at the immediate conclusion of a match and seemingly without any thought. Defendant testified that he did not know that Bradley was standing in the path of the tennis ball and that, had he known differently, he would not have hit the ball in that direction. Indeed, defendant apologized to Bradley after the injury and grabbed an ice pack for him. Defendant's behavior certainly appears to be careless, but it is not the type of behavior that indicates the indifference to harm necessary to show reckless misconduct. Accordingly, we conclude that the trial court properly granted defendant's motion for summary disposition." (Ex 1, 3-4).

STANDARD OF APPELLATE REVIEW

Plaintiff correctly states that the *de novo* standard of appellate review applies because this case involves:

- the trial court's decision on a motion for summary disposition, *Ritchie-Gamester*, 461 Mich at 76-77; and
- interpretation of a common-law doctrine, *Bertin*, 502 Mich at 608.

Defendant requested summary disposition under both MCR 2.116(C)(8) & (10) based on the "reckless misconduct" standard of liability. Defendant's request under subrule (C)(8) was based on Plaintiff's failure to allege reckless misconduct in his complaint. Summary disposition under subrule (C)(10) was requested because the undisputed facts established that Defendant's conduct was not reckless.

A motion for summary disposition under subsection (C)(8) tests the legal sufficiency of the complaint. Courts must accept all well-pleaded factual allegations as true, and decide the motion on the pleadings alone. MCR 2.116(G)(5). The moving party is entitled to summary disposition under subsection (C)(8) if the claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *El-Kahlil v Oakwood Healthcare, Inc*, 504 Mich 152, 159-160 (2019); *Maiden, supra*, 119-120.

A motion for summary disposition under subsection (C)(10) tests the factual sufficiency of the complaint. Pleadings, depositions and other substantively admissible evidence submitted by the parties are considered in deciding a motion under that subrule. MCR 2.116(G)(5)-(6). The evidence and all legitimate inferences must be viewed in the light most favorable to the nonmoving party. Summary disposition is appropriate where the proffered evidence fails to establish a genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law. *El–Khalil, supra; Maiden, supra*, 120.

ARGUMENT

I. AS A MATTER OF LAW, DEFENDANT IS ENTITLED TO SUMMARY DISPOSITION ON PLAINTIFF'S "SPORTS INJURY" CLAIM UNDER THE "RECKLESS MISCONDUCT" STANDARD BECAUSE (1) PLAINTIFF AND DEFENDANT WERE CO-PARTICIPANTS IN THE TENNIS PRACTICE, (2) THE RISK OF BEING HIT BY A TENNIS BALL WAS INHERENT IN THAT RECREATIONAL ACTIVITY AND REASONABLY FORESEEABLE UNDER THE FACTS OF THIS CASE, AND (3) DEFENDANT'S CONDUCT WAS NOT RECKLESS.

The parties agree on the following two principles of law.

First, "co-participants in a recreational activity owe each other a duty not to act recklessly". *Ritchie-Gamester, supra*, 75, 95. *Accord, Bertin, supra,* 609; *Composto v Albrecht,* 328 Mich App 496, 500 (2019). If a co-participant's conduct was merely careless or negligent, he is entitled to summary disposition. *Ritchie-Gamester, supra*, 89-90.

Second, the "reckless misconduct" standard applies only to risks that are inherent in the recreational activity, i.e., risks "that are reasonably foreseeable under the circumstances of the case." *Bertin, supra*, 622; *Composto, supra*, 502.

The parties' dispute centers on whether Plaintiff and Defendant were "co-participants in a recreational activity", and whether being hit by a tennis ball was a reasonably foreseeable risk inherent in that activity. Defendant contends that both lower courts correctly concluded that (1) Plaintiff and Defendant were co-participants in the team tennis practice; (2) being hit by a tennis ball was a reasonably foreseeable risk inherent in that activity, and (3) Defendant's conduct was not reckless.

A. Plaintiff and Defendant Were Co-Participants.

Plaintiff argues that he and Defendant were not co-participants because they were not

playing together in a match. The trial court concluded that the parties were co-participants because they were members of the tennis team, and both were present at the practice. (App B, 11). The Court of Appeals agreed because even if tennis practice was over, the parties were still engaged in a recreational activity. (Ex 1, 2-3).

The lower courts' conclusions are consistent with the Court of Appeals' recent explanation of when people are co-participants in a recreational activity. In *Composto, supra*, plaintiff was walking on a hike-bike trail when he was struck and injured by defendant bicyclist. In the resulting suit, plaintiff argued that the "ordinary negligence" standard of care applied because the parties were engaged in different activities. Defendant requested summary disposition because his conduct did not meet that standard, or did not constitute reckless misconduct. The trial court held that the "ordinary negligence" standard applied, and denied defendant's motion. *Id.*, 498-499.

Relying on *Ritchie-Gamester, supra,* the Court of Appeals reversed that ruling because the parties were co-participants while "using a shared, multi-use recreational trail":

> "Here, plaintiff, who was walking, and [defendant], who was biking, were not engaged with each other in precisely the same recreational act or sport at the time of their collision. As the trial court observed, walking is an inherently different activity than biking. **However, both plaintiff and [defendant] were engaged in using a shared, multi-use trail, and thus were 'coparticipants' in the activity of using the trail.** In this factual context, by choosing to use the Hike-Bike Trail for recreational purposes, plaintiff voluntarily subjected himself to the inherent, readily apparent, and foreseeable risks, not just of walking, but of using a shared recreational trail together with other trail users. Mindful of *Ritchie-Gamester*, **we consider 'recreational activity' to encompass the parties' shared use of the multi-use trail specifically designated for recreational purposes, such that the reckless-misconduct standard of care applies if plaintiff's injuries resulted from an inherent risk of using the trail.** See *Bertin*, 502 Mich at 609; 918 NW2d 707." *Composto, supra*, 501-502 (emphasis added).

The *Composto* Court declined to "indulge the fiction of different standards of care" for

persons engaged in different activities because it would be contrary to "the reasoning and spirit of *Ritchie-Gamester*":

> "To conclude otherwise would subject the trail users to various standards of care depending upon with whom they interacted. If a bicyclist collided with another bicyclist, the defendant bicyclist would be held to a reckless-misconduct standard of care, but if the bicyclist collided with an in-line skater, he would be held to a standard of care for ordinary negligence. What if an in-line skater collided with a skate boarder, or a runner with a walker? **We decline to indulge the fiction of different standards of care created by ever-more finely drawn distinctions in the precise activity engaged in and instead implement the reasoning and spirit of *Ritchie-Gamester*.** Just as the ice rink during open skate accommodates the speed skater and the ice dancer, the novice and the expert, the multiuse trail accommodates various modes of conveying oneself down the trail by participants with different levels of skill and ability, all engaged in the umbrella activity of 'recreational trail use.'" *Id.*, 502, n2 (emphasis added).

This Court unanimously denied plaintiff's application for leave to appeal. *Composto v Albrecht*, 939 NW2d 258 (2020).

Relying on *Overall v Kadella*, 138 Mich App 351 (1984) – which involved a fight after a hockey game – Plaintiff argues that he and Defendant were not co-participants because he had finished his match before the accident occurred. Relying on *Schmidt v Youngs*, 215 Mich App 222 (1996) – which involved an eye injury caused by an errant golf ball – Plaintiff asserts that the "ordinary negligence" standard should be applied in this case. Both of those decisions were discussed by this Court in *Ritchie-Gamester, supra*, 78-81,

This Court limited the holding of *Overall* to injuries caused by intentional acts. *Id.*, 79. As to *Schmidt*, this Court rejected its "ordinary negligence" standard after examining cases from other jurisdictions. *Id.*, 81-85. As this Court explained, that lower threshold of liability would result in a "flood of litigation":

> "Courts have also recognized the potential flood of litigation that might result from the use of an ordinary negligence standard:

> "'If simple negligence were adopted as the standard of care, every punter with whom contact is made, every midfielder high sticked, every basket ball player fouled, every batter struck by a pitch, and every hockey player tripped would have the ingredients for a law suit if injury resulted. When the number of athletic events taking place . . . over the course of a year is considered, **there exists the potential for a surfeit of lawsuits when it becomes known that simple negligence, based on an inadvertent violation of a contest rule, will suffice as a ground for recovery for an athletic injury. This should not be encouraged.**'" *Id.,,* 85, quoting *Jaworski v Kiernan,* 241 Comm 399, 409-410; 696 A2d 332, 338 (1997) (emphasis added).

This Court also noted the "everyday reality of participation in recreational activities":

> ". . . A person who engages in a recreational activity is temporarily adopting a set of rules that define that particular pastime or sport. In many instances, the person is also suspending the rules that govern everyday life. . . .
>
> ". . . **When people engage in a recreational activity, they have voluntarily subjected themselves to certain risk inherent in that activity. When one of those risks results in injury, the participant has no ground for complaint.** . . ." *Id.,* 86-87 (emphasis added). *Accord, Bertin, supra,* 610.

The "reckless misconduct" standard for sports injuries was adopted because:

> ". . . We believe that this standard most accurately reflects the actual expectations of participants in recreational activities . . . .[W]e believe that participants in recreational activities do not expect to sue or be sued for mere carelessness. A recklessness standard also encourages vigorous participation in recreational activities, while still providing protection from egregious conduct. Finally, this standard lends itself to common-sense application by both judges and juries." *Ritchie-Gamester, supra,* 89.

Hoke v Cullinan, 914 Sw2d 335 (Ky, 1995), was one of the out-of-state cases cited with approval in *Ritchie-Gamester, supra,* 82. There, plaintiff maintained that defendant was angry after misplaying a point, and returned the tennis ball too aggressively. The ball struck plaintiff in the eye. Plaintiff argued that when defendant struck the ball, "tennis play had stopped and plaintiff was in a protected state and location". *Id.,* 336.

The Kentucky Supreme Court held that the trial court had properly dismissed plaintiff's

suit. Initially, the *Hoke* Court rejected plaintiff's argument that the ball was not "in play" when defendant hit the ball. *Id.*, 337. Thereafter, the Court adopted the "reckless misconduct" standard, and held that there was "no indication that Mr. Hoke was acting either recklessly or intentionally when he volleyed the ball back to the opposing team and hit Mr. Cullinan." *Id.*, 338-339.

Other out-of-state cases have held that injuries caused by errant tennis or racquet balls involve risks inherent in those sports, which are not actionable absent culpable misconduct:

- *Wertheim v US Tennis Ass'n*, 150 AD2d 157, 158; 540 NYS2d 443 (1989), *lv den* 74 NY2d 613 (1989) – umpire hit by a tennis ball during a tournament, which caused him to fall and die from a subdural hematoma – tennis association entitled to summary judgment because "[b]eing hit by a tennis ball is surely a risk normally associated with the sport", and there was no evidence of reckless misconduct.

- *Ruben v Jewish Center of Greater Buffalo, Inc*, 116 AD2d 1016; 498 NYS2d 633 (1986), *lv den* 68 NY2d 607 (1986) – plaintiff struck in the eye with a racquet ball hit by defendant during a game – defendant entitled to summary judgment because defendant's inaccurate return of the ball did not constitute negligence, and "plaintiff assumed the known inherent risks associated with the sport of racquet ball."

The Court of Appeals reached the same conclusion in a case that is factually similar to this case – *Chryczyk v Juhas*, unpublished per curiam opinion of the Court of Appeals, issued January 27, 2011 (Docket No. 294348) (Ex 6). The trial court cited this opinion during its ruling. (App B, 12).

In *Chryczyk*, plaintiff and defendant were teammates on the Anchor Bay High School tennis team, and were engaged in a team practice. They were separately practicing on opposite sides of adjacent tennis courts. When a stray ball rolled onto his court, defendant picked up the ball, tossed it in the air, and hit it backhand intending to clear the ball to a far fence.

The tennis ball accidently hit plaintiff in the eye. Plaintiff believed that defendant hit the

ball hard because he was frustrated by the "dead" ball, and maintained that defendant should have swept the ball to the fence per rules governing the practice.

In his complaint, plaintiff alleged that defendant "negligently and accidentally" struck him. After defendant filed a motion for summary disposition based on *Ritchie-Gamester*, plaintiff proffered an amended complaint alleging that defendant had acted recklessly. The trial court denied defendant's motion because a jury could conclude that defendant's actions rose to the level of reckless misconduct. The Court of Appeals reversed, and remanded for entry of an order granting summary disposition to defendant.

Initially, the *Chryczyk* Court explained the "reckless misconduct" standard in *Ritchie-Gamester*, and examined the definition of reckless misconduct in *Behar v Fox*, 249 Mich App at 319. (Ex 6, 2-3). Viewing the evidence in the light most favorable to plaintiff, the panel acknowledged that defendant may have it the ball hard out of frustration. (Id., 3). Nevertheless, the panel concluded that defendant's conduct was not reckless, and '[g]etting hit by an errant ball was a risk inherent to tennis practice":

> "No matter how frustrated he might have been, or how hard he hit the ball, defendant was simply trying to clear the ball from his court by hitting it between his court and plaintiff's court. There is no evidence that he was indifferent to whether the ball might strike someone. To the contrary, the undisputed evidence indicates that defendant was aiming between the courts, away from his teammates, and when he realized that the ball might strike plaintiff on the adjacent court, he called out to warn him.
>
> " The trial court reasoned that summary disposition was inappropriate because a jury could conclude that defendant struck the ball in a way that was out of the ordinary at practice. However, the deposition testimony indicated it was common practice for the students to hit errant balls forward to get them out of the way. To the extent that there was a rule that players should lightly sweep such balls to the fence line behind them, the evidence indicated that the rule was regularly violated such that defendant's actions did not exceed the normal bounds of conduct associated with tennis practice at Anchor Bay.

> "**Getting hit by an errant ball was a risk inherent to tennis practice** at Anchor Bay High School. **Defendant may have been negligent in hitting the ball as he did, but the facts do not indicate that he acted with a willingness to injure someone as plaintiff argues. Accordingly, defendant's actions do not rise to the level of reckless misconduct.** There was no genuine issue as to any material fact, and the trial court should have granted summary disposition in favor of defendants." (Ex 6, 3-4) (emphasis added).

Recognizing that some of the above cases applied the "reckless misconduct" standard to plaintiffs who were not directly competing with or against the defendant player, Plaintiff defines a co-participant as "one whose active involvement in the sporting event is necessary for the undertaking of the sporting event." Plaintiff includes in that definition a ball person, line judges, umpires and players who are "on the bench or sideline" awaiting their turn to play. (Application, 11).

Plaintiff admits that he was "on the sidelines" of the court on which Defendant was playing when he was injured. Nevertheless, Plaintiff maintains that he was not "on the field of play", and he does not fit into any of the afore-described categories of "actively involved" players who are "necessary" to a game. (Id.).

The lower courts correctly focused on the fact that Plaintiff and Defendant were participating in the tennis practice as team members, and both were near each other in the fenced area of the courts, when the accident occurred. Although Plaintiff was not playing a match, he was still participating in the tennis practice because picking up balls from the courts was a required part of that practice. Per Coach Ballard's rules, no one was dismissed from a practice until everyone had finished their matches, and all balls were removed from all courts.

As the photograph in Defendant's Appendix A shows, each set of four tennis courts was enclosed by a fence. Plaintiff was standing only ten feet behind Defendant while he was picking up balls. As the Court of Appeals aptly observed, "[t]he very nature of tennis is that tennis balls

. . . will leave the actual bounds of the court, such that a person standing near, but not on, the court risks being hit from a ball". (Ex 1, 3). Thus, Plaintiff was on the "field of play", and precisely in the same "zone of danger" that team members face when they sit in a dugout or hockey box awaiting their turn to play.

Plaintiff's attempt to hinge the applicability of the "reckless misconduct" standard on the particular role a person was engaged in, and his location vis-a-vis the "field of play", is the type of "Philadelphia lawyer-like distinctions" eschewed by this Court in *Ritchie-Gamester, supra*, 94. Adopting such fine distinctions would result in the "flood of litigation" which concerned this Court, and not "lend[] itself to common-sense application by both judges and juries" which this Court wanted to achieve.

B. Being Hit by a Tennis Ball Was a Reasonably Foreseeable Risk Inherent in the Practice.

The next question is whether being hit by a tennis ball was a risk inherent in the tennis practice. "'[T]he assessment of whether a risk is inherent to an activity depends on whether a reasonable person under the circumstances would have foreseen the particular risk that led to injury." *Bertin*, 502 Mich at 619; *Composto, supra*, 503.

> ". . . [T]he proper analysis centers on whether a reasonable person in the position of the injured participant could have foreseen that risk. **The test is objective and focuses on what risks a reasonable participant, under the circumstances, would have foreseen. The risk must be defined by the factual circumstances of the case** – it is not enough that the participant could foresee being injured in general; **the participant must have been able to foresee that the injury could arise through the 'mechanism' it resulted from.** . . ." *Id.*, 620-621 (emphasis added). *Accord, Composto, supra*.

The following factors should be considered when determining whether the risk of injury was reasonably foreseeable:

> ! "the general characteristics of the participants, such as their relationship to each other and to the activity and their experience with the sport";

- "[t]he general rules of the activity", although "those rules are not dispositive";
- "whether the participants engaged in any regular departures from the rules or other practices not accounted for by the rules";
- "any regulations prescribed by the venue at which the activity is taking place". *Id.,* 621-622.

Both lower courts analyzed the *Bertin* factors, and concluded that the risk of Plaintiff being hit by a tennis ball while standing behind Defendant was reasonably foreseeable. Plaintiff takes issue with the lower courts deciding that issue as a matter of law based on the following statement in *Bertin* – "The foreseeability of the risk is a question of fact". *Id.*, 620. Plaintiff ignores the explanatory footnote that immediately follows that sentence – "Of course, if no genuine issue of material fact remains, then a court can decide the issue under MCR 2.116(C)(10)." *Id.*, 620, fn 49. Since the relevant facts are undisputed in this case, this issue can and should be decided as a matter of law.

As the Court of Appeals observed, "Plaintiff does not argue that being hit with a tennis ball is not a reasonably foreseeable risk of playing tennis." (Ex 1, 3). Instead, Plaintiff argues that he could not have foreseen being stuck because Defendant was engaged in a scrimmage, while Plaintiff was picking up balls on the side of the court. Since they were engaged in separate and distinct activities, Plaintiff concludes that there was no relationship between the parties or the activity. Plaintiff also relies on the fact that Coach Ballard "got mad" because Plaintiff was hit by a ball and players were "messing around", and punished the team by making them run sprints. Finally, Plaintiff (for the first time in this case) argues that Defendant's conduct in hitting a ball out of frustration after losing his match was unsportsmanlike conduct that violated the Fenton High School Student Handbook and Code of Conduct. (Application, 17-18).

Plaintiff's myopic analysis avoids the broader inquiry – from an objective standpoint, was

it reasonably foreseeable that Plaintiff could be hit by a tennis ball while he was standing ten feet behind Defendant as the latter was finishing his match? Both lower courts correctly answered "yes". The Court of Appeals cited the following facts, many of which were also articulated by the trial court:

- In a team tennis practice, multiple participants play in close proximity.
- "By their very nature", tennis balls leave the actual boundaries of a court. Accordingly, persons standing near a court risk being hit by a ball.
- Plaintiff was injured while standing in the fenced tennis court area behind Defendant.
- During team practices, it is reasonable to foresee that participants will cease hitting balls at different times. Here, Defendant hit a ball backwards toward the fence immediately after finishing his match.
- Players – especially competitive high school students – hit balls out of frustration.
- Coach Ballard's repeated admonitions to his team that they should not hit balls toward the fence demonstrate that this practice was fairly common among players. (Ex 1, 3; App B, 12-13).

Accordingly, Plaintiff's injury was reasonably foreseeable under the facts of this case. Since he and Defendant were co-participants in the tennis practice, the "reckless misconduct" standard of liability applies.

C. <u>Defendant's Conduct Was Not Reckless.</u>

The remaining question is whether Defendant's act of hitting a ball out of frustration toward the fence behind him without looking to see if anyone was present constitutes reckless misconduct. Plaintiff acknowledged that Defendant did not intend to hurt him, and that the incident was an accident. Nevertheless, Plaintiff believed that Defendant had acted unreasonably by not following the rules. (Ex 7, 43). In addition, Plaintiff's complaint did not allege that

Defendant's conduct was reckless.

Both lower courts examined the following explanation of recklessness in *Behar*, 249 Mich App at 319:

> "'One who is properly charged with recklessness or wantonness is not simply more careless then one who is only guilty of negligence. His conduct must be such as to put him in the class with the willful doer of wrong. The difference is that between him who casts a missile intending that it shall strike another and him who casts it where he has reason to believe it will strike another being indifferent whether it does so or not.'" (Quoted in App B, 13 & Ex 1, 3).

In addition, breaches of formal or informal rules regarding safety do not establish that a defendant's conduct was reckless. *Id.,* 320-321, citing *Ritchie-Gamester, supra,* 92-94.

Both lower courts concluded that, at most, Defendant's conduct was careless based on the following facts:

- Defendant did not know that Plaintiff was standing behind him when he hit the ball towards the fence.

- Had he known differently, Defendant would not have hit the ball in that direction.

- When Defendant realized that Plaintiff was injured, he went over to him, apologized, and helped him get medical assistance. (App B, 13; Ex 1, 3).

Since Defendant's conduct was not reckless, he is entitled to summary disposition and dismissal of Plaintiff's claim, as a matter of law.

RELIEF

Defendant-Appellee, BRENDEN REMILLARD, respectfully requests this Honorable Court to DENY Plaintiff-Appellant's Application for Leave to Appeal in all respects.

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